**Columbia Manufacturing Corporation *and* Industrial Carpenters Local Union No. 530, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO.** Case 21-CA-19581(E)

October 15, 1982

## SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On May 27, 1982, Administrative Law Judge Richard D. Taplitz issued the attached Supplemental Decision in this proceeding. Thereafter, the Applicant and the General Counsel filed exceptions, supporting briefs, and answering briefs. The Applicant also filed a motion to supplement the application for award, and the General Counsel filed a notice of court decision published subsequent to the issuance of the Administrative Law Judge's Supplemental Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions, briefs, and other submissions[1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

On October 21, 1981,[2] the Administrative Law Judge issued an order dismissing the complaint in the underlying unfair labor practice case.[3] The Applicant's application for an award of attorney's fees and expenses under the Equal Access to Justice Act (hereinafter EAJA)[4] was filed on November 23.

EAJA, section 504(a)(2), provides that a party seeking attorney's fees and other costs "shall, within thirty days of a final disposition in the adversary adjudication, submit to the [Board] an application which shows that the party is a prevailing party." The statute's 30-day filing period is a jurisdictional prerequisite to application under EAJA, and we are without authority to extend that filing period beyond 30 days. See *Monark Boat Company*, 262 NLRB 994 (1982). Section 102.27 of the Board's Rules and Regulations provides for dismissal (upon motion) by an administrative law judge prior to issuance of a decision, and for review of such an order to dismiss. Section 102.27 states that, "[u]nless [a] request for review is filed within 10 days from the date of the order of dismissal, the case shall be closed."

With the above in mind, we turn to analysis of the instant case. The question of "final disposition" is governed by Section 102.27. As the last sentence in that section makes clear, where no party files a request for review of an order of an administrative law judge dismissing a complaint prior to issuance of a decision, the case is considered closed as of the date of the order of dismissal.[5] Here, the Administrative Law Judge issued his order dismissing the complaint on October 21. And, since no party filed a request for review, that order became the final disposition of the underlying unfair labor practice case.

The Applicant's application was filed with the Board on November 23–33 days after the final disposition of the case. Thus, the Applicant failed to comply with the jurisdictional time period specified in section 504(a)(2) of EAJA, and we therefore are without authority to pass upon the merits of the application. *Monark Boat, supra.* Consequently, we are compelled to dismiss the instant application for lack of jurisdiction.

## ORDER

It is hereby ordered that the application of the Applicant, Columbia Manufacturing Corporation, Gardena, California, for an award under the Equal Access to Justice Act be, and it hereby is, dismissed.

[1] Consistent with our decision herein, the Applicant's motion to supplement its application for award is hereby denied.

[2] All dates hereinafter refer to 1981, unless otherwise indicated.

[3] On October 5, the General Counsel moved that the Administrative Law Judge dismiss the complaint. On the same day, the Administrative Law Judge ordered all parties to show cause, by October 16, why the motion should not be granted. No party responded to the Order To Show Cause.

[4] 5 U.S.C.A. sec. 504 (1982).

[5] Indeed, the Administrative Law Judge correctly noted that it was the date of his order dismissing the complaint that established that the Applicant had prevailed.

## SUPPLEMENTAL DECISION

[Equal Access to Justice Act]

### STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard before me on August 4 and 5, 1981. The charge was filed on September 24, 1980, by Industrial Carpenters Local Union No. 530, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union. It alleges that Columbia Manufacturing Corporation, herein called the Applicant, discharged eight employees because of union activity. The charge was amended on October 22, 1980, to allege that 10 employees were discharged for that reason. The complaint issued on November 6, 1980. It alleges in substance that four employees (Ramon Amador,

Rosa Rodriguez Herrera, Teresa Jiminez, and Carlos Nuno) were discharged by the Applicant because of their protected strike activities. At the hearing the Applicant contended that it lawfully discharged those employees because they engaged in strike violence. At the outset of the hearing on August 4, 1981, counsel for the General Counsel moved to dismiss those allegations of the complaint which related to Amador and Nuno. That motion was granted. After the close of the hearing on August 5, 1981, but before the issuance of my decision, the Applicant made the contention that it had evidence that one of the witnesses called by the General Counsel had given false testimony. After various motions were made, I reopened the hearing and scheduled October 7, 1981, for the receipt of any evidence the parties wished to offer relating to the possibility of abuse of the Board's process or false testimony. By motion dated October 5, 1981, counsel for the General Counsel sought an order dismissing the complaint and closing the hearing. The motion stated that the Region had reviewed the case file and transcript of the hearing and had decided that the case was without merit and should not be pursued. On October 5, 1981, I adjourned the hearing without date pending consideration of the motion and ordered all parties to show cause, if there was any, on or before October 16, 1981, why the motion should not be granted. None of the parties responded to that order to show cause. The motion was granted and the complaint was dismissed by my order dated October 21, 1981.

In an application dated November 20, 1981, the Applicant seeks an award of attorneys' fees and expenses under the Equal Access to Justice Act, Pub. L. 96–481, 94 Stat. 2325, 5 U.S.C. §§ 504 and 102.143 (1982), *et seq.* of the Board's Rules and Regulations. That application was filed with the Board in Washington, D.C., on November 23, 1981. By order dated December 3, 1981, the Board referred the application, together with a motion to withhold a net worth statement from public disclosure, to me for appropriate action. No opposition has been filed to the motion to withhold the net worth statement from public disclosure and that motion is hereby granted.

Counsel for the General Counsel has filed an answer[1] dated April 19, 1982, to the application and the Applicant has filed a reply and a Motion for Partial Summary Judgment dated May 6, 1982.[2]

This Decision is made on the documents in the record pursuant to Sections 102.153 and 102.153(a) of the Board's Rules and Regulations.

## I. ISSUES

Counsel for the General Counsel has raised nine separate defenses to the application. They present the following issues:

1. Whether the application was timely filed.
2. Whether the application was defective in that it did not indicate affiliates and subsidiaries.
3. Whether the General Counsel's position in the underlying case was substantially justified.
4. Whether fees and expenses incurred before the effective date of the Act, October 1, 1981, are recoverable.
5. Whether fees and expenses incurred before the issuance of complaint are recoverable.
6. Whether fees and expenses incurred in the litigation of collateral proceedings such as unemployment hearings and appeals and arbitration proceedings are recoverable.
7. Whether fees and expenses relating to litigation involving Amador and Nuno are recoverable.
8. Whether fees and expenses related to the Equal Access to Justice Act proceedings are recoverable.
9. Whether the fees and expenses requested by the Applicant are reasonable.

## II. FINDINGS

### A. *The Timeliness of the Application*

By motion dated January 22, 1982, counsel for the General Counsel sought to dismiss the application. One of the grounds raised in that motion was that the application was untimely. By order dated March 18, 1982, I denied that motion. In its answer counsel for the General Counsel reraises the issue of timeliness. My conclusion is the same. However, for the convenience of those reading this Decision, I shall restate the basis for my order rather than incorporate it by reference.

My order dismissing the complaint issued on October 21, 1981. As indicated in the signed declaration of Alfred J. Landegger, attorney for Respondent, which is annexed to his points and authorities in opposition to the General Counsel's motion, that order was received by the office of Respondent's attorney on October 27, 1981. The Board order referring this matter to me indicates that Respondent's application was filed with the Board in Washington, D.C., on November 23, 1981.

Section 504(a)(2) of the Equal Access to Justice Act states:

> A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application . . . .

Section 102.148(a) of the Board's Rules and Regulations provides that:

> An application may be filed after entry of the final order establishing that the applicant has prevailed in an adversary adjudication proceeding . . . but in no case later than thirty days after the entry of the Board's final order in that proceeding. . . .

In the instant case it was the order of the Administrative Law Judge dismissing the complaint rather than a final order by the Board that established that the Applicant had prevailed. A serious argument can be made that the Administrative Law Judge's order should not be considered a final disposition until the Charging Party had failed to take an appeal to the Board on the dismissal after a reasonable time period had elapsed after the issuance of the Administrative Law Judge's order. However, even assuming that the Administrative Law Judge's order is considered the final disposition as of the date of

[1] The answer and a memorandum submitted in support thereof is referred to herein collectively as the answer.

[2] The issues raised in the Motion for Partial Summary Judgment will be considered in this Decision and the motion is therefore denied.

issuance, the Respondent's application was still timely filed under the provisions of Section 102.114(a) of the Board's Rules. That section reads:

> Sec. 102.114 *Time; additional time after service by mail or by telegraph.*--(a) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day, which is neither a Sunday nor a legal holiday. . . . Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served on him by mail or by telegraph, 3 days shall be added to the prescribed period: *Provided, however,* that 3 days shall not be added if any extension of such time may have been granted.

The Administrative Law Judge's order dismissing the complaint issued on October 21, 1981. Under the computation prescribed in the Rule, 30 days from then would be November 20, 1981. The Administrative Law Judge's order was served by mail. Section 102.113 of the Board's Rules provides that the date of service shall be the day when the matter served is deposited in the U.S. mail. However that section also states: "In computing the time from such date, the provisions in Section 102.114 apply." Section 102.114(a) specifically provides that when a party is served by mail, 3 days shall be added to the prescribed period to respond. Three days from November 20, 1981, was November 23, and that was the date upon which the application was filed with the Board.

Section 102.114(b) of the Board's Rules reads:

> (b) When the act of any of these rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the close of business of the last day of the time limit, if any, for such filing or extension of time that may have been granted.

That section must be read in conjunction with Section 102.114(a). Section 102.114(b) states that such matters as an application must be received by the Board before the close of business of the last day of the time limit. However in computing the time limit Section 102.114(a) is applicable and that section allows 3 extra days because of the mailing.

Section 102.114(a) applies to situations where a prescribed period begins after service of a notice or other paper. An argument could be made that there is no provision in the Equal Access to Justice Act for notice of a final disposition and that there is simply a flat requirement that an application be filed within 30 days of the final adjudication regardless of service of notice. Under such an interpretation a respondent could be barred from applying for attorney fees even if the Board forgot to send him a copy of the final adjudication and he did not learn of it until after the 30 days expired. There is no way to fully separate the concept of notice from the forfeiture of a right to file an application under the Equal Access to Justice Act without running into grave constitutional due process problem. When Board Rule 102.148(a) is considered in the context of Board Rules 102.113(a) and 102.114(a), it appears that a balance is struck between filing and notice requirements. Section 102.148(a) provides that the application must be filed no later than 30 days after the entry of the Board's final order. Section 102.113(a) provides that the Board's order shall be considered served as of the date that it is deposited in the mail. Section 102.114(a) provides that mail delivery gives 3 extra days for the party receiving the mail to take action.

In sum I find that Respondent's application was timely filed.

### B. *The Question of Affiliates and Subsidiaries*

The General Counsel contends that there is insufficient information pertaining to "affiliates or subsidiaries" of the Applicant to determine whether the Applicant is an eligible party under the EAJA.

Section 504(b)(l)(B) of the EAJA excludes from coverage[3] any association or organization whose net worth exceeded $5 million or whose employee complement exceeded $500 at the time the adversary adjudication was initiated. Section 102.143(g) of the Board's Rules provides that the net worth and the number of employees of the Applicant and all of its affiliates shall be aggregated to determine eligibility. Section 102.147(f) of the Board's Rules states that the Applicant must provide a detailed exhibit showing the net worth of the Applicant and any affiliates.

The application states that "there were approximately 120 management, office clerical, production and maintenance employees at the Employer's two facilities located in Gardena, California."

There is some question whether the Board's Rules simply require an applicant to affirmatively state its affiliates or subsidiaries if it has any or whether a negative statement is required. However, in its brief the General Counsel requests me to direct the Applicant to furnish a verified statement bearing on affiliation. The Applicant has already done so and therefore there is no need for such an order. In a statement given under penalty of perjury attached to the Applicant's answer, an officer of the Applicant states that the Applicant has two facilities in Gardena, California, and no other affiliates or subsidiaries. If the application in that regard were ambiguous, that ambiguity has now been corrected and that is no showing of prejudice to the General Counsel.

### C. *The Question of Substantial Justification*

Section 504(a)(1) of the EAJA provides that an award shall be made unless "the position of the agency as a party to the proceeding was substantially justified or . . . special circumstances make an award unjust." Some guidance with regard to the application of that language

[3] With exceptions not applicable here.

is given in Senate's Report 96-263 at pages 14 and 15 which states:

> Under section 504(a), a party other than the United States who prevails in an agency adjudication is entitled to reasonable fees and other expenses unless the agency finds the position of the agency as a party to the proceedings was substantially justified or that special circumstances make an award unjust. The language used in this section is identical to language presently found in Rule 37, Federal Rules of Civil Procedure. Its effect is to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified or that some other circumstances makes an award unjust. The test of whether or not a government action is substantially justified is essentially one of reasonableness. In order to defeat an award, the government must show that its case had a reasonable basis in law and fact. Absent such a showing, fees should be awarded. The section identifies one circumstance which may defeat or reduce an award—the actions of the prevailing party in unreasonably protracting the resolution of the controversy. The section further requires that the fee determination include specific written findings and conclusions which will be made a part of the record and which may be subject to judicial review under section 504(c).
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> Alternative standards were considered. For example, S. 2354, the predecessor to S. 265 in the 95th Congress, allowed for automatic awards to prevailing parties. This mandatory award was rejected because it did not account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper government enforcement efforts. A purely discretionary standard such as may be found in some existing federal fee-shifting statutes [See, e.g., 15 U.S.C. 2059 (e)(4); 33 U.S.C. 1365(d); 42 U.S.C. 1937(e)] was also considered. A discretionary standard, however, fails to account for the natural reluctance of agencies to award fees against themselves and also offers little direction to the exercise of agency discretion. The Department of Justice proposed standard, on the other hand, gives some definition and some guidance but is unnecessarily restrictive. Under the Department's proposal, fees would be awarded only where the government action was "arbitrary, frivolous, unreasonable, or groundless, or the United States continued to litigate after it clearly became so." [See *Christiansburg Garment Co.* v. *E.E.O.C.*, 434 U.S. 412, 417 (1978).] In order to recover fees under this standard, a party must first prevail and then must marshal the facts to prove that the government action was arbitrary or frivolous. Placing this heavy burden on the prevailing party makes awards difficult to obtain, particularly in agency proceedings. And where fees are so difficult to recover, the deterrent effect created by the cost of vindicating rights vis-a-vis the Government would not be lessened.
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> The standard and burden of proof adopted in S. 265 represents an acceptable middle ground between an automatic award of fees and the restrictive standard proposed by the Department of Justice. It presses the agency to address the problems of abusive and harassing regulatory practices. It is intended to caution agencies to carefully evaluate their cases and not to pursue those which are weak or tenuous. At the same time, the language of the section protects the Government when its case, though not prevailing, has a reasonable basis in law and fact. Furthermore, it provides a safety valve where unusual circumstances dictate that the Government should not be held liable, as for example when the Government is advancing in good faith a credible, though novel, rule of law.

The fact that the Government lost the case does not give rise to the presumption that its position was unreasonable.[4] However, as stated in the Conference Report to accompany H.R. 5612, H.R. Rep. No. 96-1434, 96th Congress 2d Sess:

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict, where a prior suit on the same claim had been dismissed or where there is a substantial difference between the amount or content of the Government's original pleadings and the settlement agreed to. Such cases clearly raise the possibility that the Government was not substantially justified in pursuing the ligitation . . . .

In sum the Government has the burden of establishing that its actions were substantially justified; lack of substantial justificatinn is not established simply by the Government's loss of the case; such matters as judgment on the pleadings or, in the context of this case, a successful motion by the Government to dismiss its own case can be construed as raising the possibility that the Government was not substantially justified in pursuing the litigation; where the Government's case is weak or tenuous there is no substantial justification; and where the Government's case is strong both in fact and law but the Government loses because of adverse credibility or legal findings there is substantial justification.

The conclusion is inescapable that in the instant situation the Government's case was weak and tenuous. Both the General Counsel in his answer and the Applicant in its reply agree that the Applicant furnished information to the General Counsel prior to the commencement of the hearing which indicated that the General Counsel was relying on at best unreliable and at worst perjured testimony.[5] Subsequent events indicated that the infor-

[4] House Report No. 96-1005 (Part 1), 96th Cong. 2d Sess.

[5] There is no implication herein that the General Counsel had anything to do with the perjury. The assertion is that the General Counsel was misled by the perjury of others.

mation furnished by the Applicant was reliable. At the opening of the hearing the General Counsel moved to dismiss those allegations of the complaint that alleged that two of the discriminatees, Amador and Nuno, were discharged in violation of the Act. That motion was granted. The General Counsel continued with the litigation concerning the discharge of Jiminez and Herrera in the face of information given to it by the Applicant that those alleged discriminatees were not worthy of belief. The hearing ended on August 5 and was thereafter reopened to allow the parties an opportunity to produce evidence relating to the possibility of abuse of the Board's process or false testimony. Prior to the rescheduled hearing date the General Counsel continued its investigation and apparently concluded that the information given by the Applicant was accurate because he moved to dismiss his own complaint on the grounds that it was without merit and should not be pursued. That position finds substantial support in the record of the case. The motion was granted. One can only speculate whether or not a more thorough investigation before issuance of the complaint would have resulted in a dismissal of the charge rather than the issuance of the complaint, but it is over-generous to describe the General Counsel's case as weak or tenuous. It actually fell apart. Under these circumstances I find that the General Counsel's case did not have a reasonable basis in law and fact.

### D. *Fees and Expenses Incurred Prior to the Effective Date of the EAJA*

The EAJA became effective on October 1, 1981. Section 102.143 of the Board's Rules and Regulations defines "adversary adjudication" for the purpose of eligibility under the EAJA as "unfair labor practice proceedings pending before the Board on complaint . . . at any time between October 1, 1981, and September 30, 1984." This case was pending before the Board between those two dates. The case is therefore one that is subject to the EAJA. Section 504(a) of the Act provides for fees and expenses: "in connection with that proceeding . . . ." Section 102.144(a) of the Board's Rules speaks of "fees and expenses incurred in connection with an adversary adjudication." The fees and expenses that were incurred prior to October 1, 1981, were in connection with the Applicant's case and the case comes within the ambit of the EAJA because it was pending on October 1, 1981. In such circumstances the fees and expenses incurred prior to October 1, 1981, are recoverable. *Heydt* v. *Citizens State Bank*, 668 F.2d 444 (8th Cir. 1982); see also *Bradley* v. *The School Board of Richmond*, 416 U.S. 696 (1974).[6]

[6] In *Photo Data, Inc.* v. *Sawyer*, 533 F.Supp. 348 (U.S.D.C. 1982), a case arising under the EAJA, the court held:

> The Act explicitly applies to cases pending on October 1, 1981, and nothing in the legislative history suggests that it should be interpreted to apply only to that part of the case pending on October 1, 1981 that occurs on or after that date. Moreover, construing the Act to bifurcate cases on October 1, 1981 would eschew the purpose of the Act to provide financial assistance to those litigants who would not ordinarily be able to contest unreasonable government action, as it would diminish their recovery and thereby remove the incentive to sue. Without express direction from the Congress this Court will not infer such an incongruous intent.

### E. *Fees and Expenses Incurred Prior to Issuance of the Complaint*

The EAJA grants relief in cases involving adversary adjudications. However as is set forth above, that Act also allows fees and other expenses incurred "in connection with that proceeding." As the General Counsel correctly points out, a precomplaint investigation does not constitute an adversary adjudication. The General Counsel is obligated by law to undertake an investigation when a charge is filed and has no discretion in that regard. However, where the precomplaint investigation involves fees and expenses to a charged party and that investigation leads to the issuance of a complaint and an adversary adjudication, the precomplaint costs and expenses are incurred in connection with the complaint case and are directly related to that case. Such fees and expenses are therefore compensable under the EAJA. In the instant case the charge and amended charge alleged that 10 employees were discharged in violation of the Act. The General Counsel's investigation resulted in a dismissal of the charge allegations relating to six of those dischargees. With regard to those six, the Government took no action other than to investigate and refuse to issue a complaint. Any costs and expenses incurred by the Applicant with regard to those six employees are therefore not recoverable under the EAJA. The precomplaint fees and expenses incurred with regard to the other four employees who were named in the complaint are compensable under the EAJA.

The itemization of attorneys' services rendered and fees charged annexed to the application indicates that attorney Alfred Landegger spent 18-1/2 hours and that attorney Stefan Mason spent 3 hours on the case prior to issuance of the complaint on November 6, 1980. There is no indication in that itemization as to what part of the work was spent in matters relating to the four employees who were ultimately named in the complaint as discriminatees and what part on the six employees who were not named. In the absence of such itemization I will assume that the time was equally devoted to the 10 individuals named in the charge. As the work attributable to the six employees who were not named in the complaint is not compensable, I shall disallow six-tenths of the hours attributed to precomplaint fees. Those fees were for 18-1/2 and 3 or 21.5 hours and six-tenths of that figure is 12.9 hours.

### F. *Collateral Proceedings*

The Applicant's itemization of attorneys' fees rendered and fees charged indicates that attorney Alfred Landegger spent a total of 173.75 hours spread over 110 different days between September 24, 1980, and November 20, 1981. Each date is separately listed and details are set forth as to the work done on that particular day. The itemization indicates that on 25 of those days some time was spent on matters relating to unemployment insurance, the employment development department, and arbitration. On most of those days there are entries for those matters and for the unfair labor practice case, and there is no separation with regard to the time spent on one or the other. The total amount of time spent on

those days was 22 hours. Three-quarters of an hour out of those 22 was spent prior to the issuance of the complaint and one-half of that time has already been disallowed. The total amount of time spent will therefore be considered as 21.6 hours. The Applicant contends the hours spent on such matters as unemployment insurance and arbitration were in connection with and necessary to the unfair labor practice proceeding. Those matters might indeed be useful to the Applicant in connection with the unfair labor practice proceeding but they were in themselves independent of the unfair labor practice proceeding and in all likelihood would have been incurred whether or not a complaint had issued. As there was some interplay between those matters and the unfair labor practice proceedings and as there was also some work done on the unfair labor practice case on most of those dates in question, I will disallow only half of the 21.6 hours. That comes to 10.8 hours.

### G. *The Dismissal of the Allegations Relating to Amador and Nuno at the Commencement of the Hearing*

As is set forth above, at the commencement of the hearing on August 4, 1981, the General Counsel moved to dismiss those portions of the complaint relating to Amador and Nuno. That motion was granted. In its answer the General Counsel takes the position that that portion of the case was resolved prior to October 1, 1981, and was therefore not pending as an "adversary adjudication" as of the effective date of the Act.

The complaint was pending before me as of October 1, 1981. Prior to that time I had granted a motion to dismiss part of the complaint but the order granting that motion was not a final order of the Board. The allegations in the complaint concerning Amador and Nuno were not completely put at rest. My order dismissing that portion of the complaint was still subject to the possibility of review by the Board. In the ordinary course of events I would have issued an administrative law judge's Decision and any party, including the charging party, would then have had 20 days to file exceptions. Section 102.46 of the Board's Rules provides for such exceptions "to the Administrative Law Judge's Decision or to any other part of the record or proceeding (including rulings upon all motions or objections) . . . ." I believe that the work done by the Applicant's counsel relating to Amador and Nuno was sufficiently connected to a matter that was pending on October 1, 1981, to be compensable under the EAJA.

### H. *Fees and Expenses Incurred in the EAJA Proceeding*

The Applicant seeks an award for time spent in the preparation and processing of the application under the EAJA. Such fees are clearly in connection with the case that was pending on October 1, 1981.

In analogous cases arising under the Civil Rights Act, United States Courts of Appeals have held that such fees are compensable. *Manhart* v. *City of Los Angeles*, 652 F.2d 904, 909 (9th Cir. 1981); *Love* v. *Mayor, City of Cheyenne*, 620 F.2d 235, 237 (10th Cir. 1980); *Weisenberger* v. *Huecker*, 593 F.2d 49, 53-54 (6th Cir. 1979), cert. denied 444 U.S. 880 (1979); *Souza* v. *Southworth*, 564 F.2d 609, 614 (1st Cir. 1977). In *Manhart* v. *City of Los Angeles, supra*, the court held:

> Finally, plaintiffs have requested attorneys' fees for time spent litigating the fees issue itself in district court and on appeal. They are entitled to such an award. *Williams* v. *Alioto*, 625 F.2d at 850; *Rosenfeld* v. *Southern Pacific Co.*, 519 F.2d at 530; *Johnson* v. *Mississippi*, 606 F.2d 635, 638-39 (5th Cir. 1979). It would be inconsistent to dilute an award of fees by refusing to compensate an attorney for time spent to establish a reasonable fee. *Lund* v. *Affleck*, 587 F.2d 75, 77 (1st Cir. 1978).

The same logic applies in the instant case and I therefore find that the fees and expenses related to the drafting and processing of the application are recoverable.

### I. *The Reasonableness of the Fees and Expenses*

The itemization of attorneys' services rendered and fees charged annexed to the application consists of a detailed compilation of the work performed by the Applicant's attorneys on specified dates and the number of hours spent performing that work. It listed 173.75 hours for attorney Alfred Landegger of which 23.7 hours were disallowed as is set forth above. That leaves 150.05 hours. Also claimed are 54.75 hours for attorney Stefan Mason;[7] .25 hours for attorney Belle C. Mason; and 12.75 hours for attorney Harold Knee. The total is 217.8 hours. The application also itemizes expenses which come to $1,439.05.

The application seeks $100 per hour for Landegger; $135 per hour from September 1980 to August 1981 and $145 per hour thereafter for Stefan Mason; $100 per hour for Belle Mason; and $110 per hour for Knee. However, the EAJA provides that fees may not be awarded in excess of $75 per hour unless the agency determines by regulation that a higher fee is justified.[8] The Applicant has petitioned the Board to increase the maximum rate for attorneys' fees and that petition has been retained by the Board for appropriate action. The petition is not before me and I am limited to the $75 maximum.

Except for the assertions, that fees and expenses are not compensable, that were raised in connection with the matters set forth in the sections above, the General Counsel does not contend in his answer that the itemized expenses were unreasonable. Expenses in the amount of $1,439.05 are therefore awarded.

Much has been written with regard to the criteria used in setting a reasonable hourly rate. See, for example, the 12 criteria discussed in *Kerr* v. *Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), cert. denied 425 U.S. 951 (1976).[9] Those cases may be considered by the Board in

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[7] In its application the Applicant totals the hours for Mason at 54.75, even though the itemization lists 60 hours. The General Counsel has relied on the 54.75 figure in its answer and I shall also use that figure.

[8] See Sec. 102.145 of the Board's Rules.

[9] See also *National Association of Concerned Veterans* v. *Secretary of Defense*, (D.C. Civil Action No. 79-0211) (D.C. Cir. April 23, 1982).

the petition to grant more than the $75 per hour. However, I am limited to the $75-per-hour figure. Section 102.145(a) of the Board's Rules provides that: "Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys . . . ." The General Counsel does not assert that $75 an hour is an unreasonable hourly rate. In its answer the General Counsel argues that if any award is granted the number of hours claimed should be reduced and the remaining hours should be multiplied by the statutory maximum rate of $75 per hour. I find that $75 an hour is not unreasonable. A more serious question is raised concerning the number of hours that are compensable.

Section 102.145(c)(3) of the Board's Rules provides that in determining the reasonableness of the fees sought consideration should be given to the time actually spent in the representation of the Applicant. The General Counsel does not contend that there is any discrepancy between the time actually spent and the time as itemized in the application. Section 102.145(c)(4) of the Board's Rules provides that consideration should be given to "the time reasonably spent in the light of the difficulty or complexity of the issues in the adversary adjudication proceeding." The General Counsel does contend that the Applicant's attorneys spent an unreasonable amount of time on the case and specifically asserts that there is no apparent reason why more than one attorney had to work on the case. The General Counsel requests that the 54.75 hours of work attributed to Stefan Mason be disallowed.

This was not an unusually complicated case. Because it was truncated by the General Counsel's motion to dismiss his own complaint there were only 2 days of actual hearing. It was apparent from observing Landegger's conduct during the hearing that he is a fully competent attorney. There is little doubt that he could have adequately represented his client without the assistance of the other members of his firm. It was also apparent that he is extremely zealous and conscientious with regard to the interests of his client. In the particular circumstances of this case I am unprepared to find that he was over zealous or unreasonable in securing the limited assistance of other members of his firm. It is very likely that the diligence of the Applicant's counsel prevented not only a substantial miscarriage of justice but also abuse of the Board's process.[10]

In sum I find that the Applicant is the prevailing party and meets the eligibility requirements of the EAJA; that the General Counsel's position was not substantially justified and no special circumstances make an award unjust; and that the Applicant is entitled to a fee award based on 217.8 hours at $75 an hour which equals $16,335 plus an expense award of $1,439.05, for a total award of $17,774.05.

Upon the foregoing findings and conclusions, and the entire record, and pursuant to Section 102.153 of the Board's Rules, I hereby issue the following recommended:

## ORDER[11]

The application of Columbia Manufacturing Corporation for attorneys' fees and expenses under the Equal Access to Justice Act is hereby granted to the extent that the Applicant is awarded $17,774.05.

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[10] In his answer, the General Counsel notes that Landegger spent over 20 hours and Mason spent over 9 hours in preparing and drafting the EAJA Application. The General Counsel asserts that that was an unreasonable period of time for which to be reimbursed. After reviewing the documents in the record I do not find that an unreasonable amount of time was spent on the application.

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.